

² Although appellant initially requested an oral argument before the Board, by letter dated June 24, 2015, he withdrew his oral argument request.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated January 29, 2003, the Board reversed September 12, 2001 and May 7, 2002 OWCP decisions reducing appellant's compensation as he had the capacity to earn wages in the selected position of telecommunicator.³ The Board found that the record contained an unresolved conflict in medical opinion regarding whether he could perform the duties of a telecommunicator. The facts and circumstances as set forth in the prior decision by the Board are hereby incorporated by reference.

By decision dated June 4, 2013, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award effective June 2, 2013 based on its finding that he refused an offer of suitable work under 5 U.S.C. § 8106(c).⁴ It found that the opinion of Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon and OWCP referral physician, constituted the weight of the evidence and established that the offered position of facilities management clerk was within his work restrictions.

Following a review of the written record, in a decision dated November 26, 2013, an OWCP hearing representative affirmed the June 4, 2013 termination decision. She found that the medical evidence from Dr. Luis F. Pagani, an attending Board-certified neurologist, and Dr. Fisher, the referral physician, supported that the offered position was suitable. The hearing representative also determined that OWCP had complied with its procedural requirements prior to terminating appellant's compensation.

Subsequent to the hearing representative's November 26, 2013 decision, appellant resubmitted June 4 and July 3, 2013 progress reports from Dr. Pagani which were already of record. In a report dated November 4, 2013, Dr. Pagani discussed the employing establishment's offer for appellant to work as a facility management clerk. He diagnosed bilateral carpal tunnel syndrome and a herniated disc. Dr. Pagani noted that he did not object to appellant's attempting the sedentary position "on a trial basis."

On December 16, 2013 appellant requested a review of the written record. He submitted a February 1, 2005 award from the Department of Veterans Affairs (DVA) for a 60 percent service-related back condition. The decision also found that appellant was not employable. Appellant additionally enclosed a fully favorable December 16, 2013 decision from the Social Security Administration (SSA).

³ Docket No. 02-1754 (issued January 29, 2003). On February 9, 1994 appellant, then a 42-year-old boiler operator, filed an occupational disease claim alleging that he sustained bilateral carpal tunnel syndrome due to a mercury spill at work on May 25, 1992. He also attributed his condition to repetitive work activities. OWCP accepted the claim for bilateral carpal tunnel syndrome and paid appellant compensation for total disability beginning August 31, 1995. Appellant underwent a right carpal tunnel release in January 1996 and a left carpal tunnel release on February 10, 1997.

⁴ In a decision dated December 16, 2005, OWCP terminated appellant's compensation and authorization for medical benefits effective February 19, 2005 as he had no further employment-related disability or need for medical treatment. On February 8, 2006 an OWCP hearing representative set aside the December 16, 2005 decision after finding that the opinion of the impartial medical examiner was insufficiently rationalized to meet OWCP's burden of proof.

On December 16, 2013 appellant resubmitted a letter originally dated December 27, 2004 and submitted in response to a proposed termination decision by OWCP.⁵ He added the date of December 16, 2013 below the December 27, 2004 date.

By decision dated April 23, 2014, OWCP denied appellant's second request for a review of the written record. It found that as he had previously received a hearing, in the form of a review of the written record, he was not entitled to a second hearing or review of the written record as a matter of right. OWCP considered the request within its discretion and determined that the matter could be equally well addressed through the reconsideration process.

Appellant submitted progress reports from Dr. Pagani dated from May 29 to December 22, 2014. In these reports, Dr. Pagani discussed his complaints, diagnosed carpal tunnel syndrome and a herniated lumbar disc, and provided pain management.

On October 31, 2014 appellant's Senator advised that he had contacted his senate office to determine "the status of [appellant's] request for reconsideration" that he submitted in December 2013. In an enclosed October 3, 2014 letter, appellant discussed an alleged mercury spill at the employing establishment in 1992 and his Equal Employment Opportunity Commission complaints. He maintained that he had been disabled for the past 20 years as found by DVA, SSA, and OWCP. Appellant questioned why OWCP altered his disability status from total to partial disability and asserted that the job offer from the employing establishment was not within his physical capabilities. He indicated that on December 16, 2013 he filed a "[r]econsideration of the [w]ritten [r]eports."

On December 16, 2014 appellant's other Senator from his state indicated that appellant had contacted his office for assistance in determining the status of his reconsideration request submitted in December 2013. He enclosed a copy of the same October 3, 2014 letter that was submitted by the first Senator's office.

In letters dated December 18, 2014, OWCP informed both Senators that appellant had requested reconsideration on December 16, 2014.

By decision dated January 14, 2015, OWCP denied appellant's request for reconsideration as it was untimely and failed to demonstrate clear evidence of error. It determined that it had received his request for reconsideration on December 16, 2014.

On January 23, 2015 appellant argued that the medical evidence showed that he was unable to perform the offered position and that other government agencies found that he was disabled. He submitted a January 21, 2015 progress report from Dr. Pagani. On January 25, 2015 appellant again argued that DVA and SSA found that he was totally disabled. He enclosed a newspaper article showing that his work location was cutting jobs, the fully favorable SSA rating, and an August 5, 1995 determination by DVA that he could not work as a result of disability.

⁵ In a report dated January 7, 2014, Dr. Steven Umansky, a Board-certified orthopedic surgeon, related that appellant had no work restrictions "but may not be capable of doing everything his job requires."

In a decision dated February 9, 2015, OWCP found that appellant's request for reconsideration was untimely and did not show clear evidence of error.

On appeal appellant alleges that OWCP did not consider all the medical evidence and that he is totally disabled. He further contends that the position offered to him by the employing establishment was not publically offered and that he experienced toxic mold exposure. Appellant maintains that he was wrongfully terminated, questions why he was classified as partially disabled, and alleges that he was not able to review his file before his hearing.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.⁶ The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the application for reconsideration.⁷

According to 5 U.S.C. § 8128(a), a claimant is not entitled to a review of an OWCP decision as a matter of right.⁸ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority as permitted under 5 U.S.C. § 8128(a) of FECA. As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁰ According to OWCP procedures, date received is determined by the document received date in the Integrated Federal Employees Compensation System.¹¹

A claimant may apply for reconsideration of a final decision regardless of the date of injury or death. While no special form is required, the request must be in writing, be signed and dated by the claimant or the authorized representative, and be accompanied by relevant new evidence or argument not considered previously. The request should also identify the decision and the specific issue(s) for which reconsideration is being requested.¹²

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.605.

⁸ *G.H.*, 58 ECAB 183 (2006); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a); *see also Thankamma Mathews*, 44 ECAB 765 (1993).

¹⁰ 20 C.F.R. § 10.607.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). This section provides that, for decisions prior to August 29, 2011, the application for reconsideration must be mailed within one year.

¹² *Id.* at Chapter 2.1602.2(a) (October 2011).

ANALYSIS

The Board finds that OWCP improperly determined that appellant did not request reconsideration within the one-year time limitation period set forth in section 10.607. OWCP issued its last merit decision on November 26, 2013. The one-year time limitation begins to run on the date following the date of the original OWCP decision.¹³ Therefore, appellant had until November 26, 2014 to timely provide OWCP with a request for reconsideration.¹⁴

In correspondence received October 31, 2014, appellant's Senator requested that OWCP provide the status of appellant's purported December 2013 request for reconsideration. The Senator enclosed an October 3, 2014 letter, from appellant, who questioned the finding that he was partially disabled and that the offered position was suitable. On December 16, 2014 appellant's other Senator also inquired into an alleged December 2013 reconsideration request and submitted the same October 3, 2014 letter. OWCP treated the December 16, 2014 correspondence from this Senator as a request for reconsideration, but did not treat the same correspondence it received from the first Senator on October 31, 2014 as a reconsideration request.

OWCP procedures provide that an application for reconsideration does not have to be on an appeal request form.¹⁵ The word reconsideration does not need to be stated in the request for it to be considered valid, but sufficient detail should be provided to discern the decision being contested.¹⁶ In his October 3, 2014 letter, appellant provided his OWCP number and maintained that the job offered by the employing establishment was not within his capabilities. He also indicated that in December 2013 he requested reconsideration of written reports. However, appellant appears to be referencing his December 2013 request for a review of the written record. There is no evidence that he requested reconsideration in December 2013.

Although the October 3, 2014 letter, initially received by OWCP on October 31, 2014, does not contain a formal request for reconsideration, the Board finds that it is sufficiently detailed to identify the decision being contested. The record further contains additional medical evidence submitted subsequent to its last merit decision. The Board accordingly finds that appellant filed a timely application for reconsideration on October 31, 2014. In a decision dated January 14, 2015, OWCP reviewed the evidence under a clear evidence of error standard, which is appropriate only for untimely applications for reconsideration.¹⁷ The case will accordingly be

¹³ See *C.K.*, Docket No. 10-1665 (issued May 25, 2011).

¹⁴ See *R.D.*, Docket No. 14-896 (issued August 1, 2014).

¹⁵ Federal (FECA) Procedure Manual, *supra* note 11 at, Chapter 2.1602.3 (October 2011) (letter format is acceptable, and should contain sufficient detail to discern the decision being contested); see also *E.R.*, Docket No. 13-1800 (issued February 21, 2014).

¹⁶ See *M.H.*, Docket No. 14-1389 (issued October 22, 2014).

¹⁷ See *J.P.*, Docket No. 12-1596 (issued March 27, 2013); 20 C.F.R. § 10.607(b).

remanded to OWCP for proper review of the timely application for reconsideration and issuance of an appropriate decision.¹⁸

CONCLUSION

The Board finds that OWCP, in its January 14, 2015 decision, improperly found that appellant failed to file a timely request for reconsideration.¹⁹

ORDER

IT IS HEREBY ORDERED THAT the February 9 and January 14, 2015 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 20, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See *E.B.*, Docket No. 12-84 (issued May 15, 2012).

¹⁹ In view of the Board's finding that appellant timely requested reconsideration, the issue of whether OWCP properly denied his request for reconsideration in its February 9, 2015 decision is moot.